

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 164 OF 2020

(Arising from Kinondoni District Court in Probate Appeal No. 7 of 2020 and Originating from Primary Court of Kawe in Probate Cause No. 253 of 2018)

IBRAHIM HASSAN HANZURUNI APPELLANT

VERSUS

ASHURA SELEMANI FARAJA RESPONDENT

JUDGMENT

1st June & 20th July, 2021

BANZI, J.:

On 2nd July, 2018, Hassan Hanzuruni Farahani ("the deceased") died interstate, leaving behind his wife Ashura Selemani Faraja (the Respondent) and his sole son, Ibrahim Hassan Hanzuruni (the Appellant). He also left behind substantial properties namely, seven houses, four motor vehicles and two bank accounts at NMB bank and UMOJA bank. Following his death, and after being proposed in a clan meeting, on 11th December, 2018, the Appellant knocked the doors of Kawe Primary Court ("the trial court") seeking to be appointed administrator of the deceased's estate. His application went unchallenged; thus, on 20th March, 2019, he was officially appointed administrator of the estate of the late Hassan Hanzuruni Farahani.

Accordingly, he was ordered to fill in Forms No. IV and V and submit an inventory to the court on or before 23rd April, 2019.

The record of the trial court shows that, on 23rd April, 2019, the Appellant informed the trial court that, he had submitted Form No. V. Thereafter, the trial court adjourned the matter until 23rd August, 2019 so that the probate could be closed and ordered that, the Appellant be given various documents to be submitted to NMB bank, UMOJA bank and the Tanzania People's Defence Force ("JWTZ"), where the deceased once worked. However, on 24th September, 2019, the Appellant applied for extension of time for such closure, as he had not yet distributed the deceased's assets. Having noticed that it was the BAKWATA (the Islamic Council of Tanzania) which distributed the deceased's assets under Islamic law, the Respondent successfully applied for revocation of appointment of the Appellant. In addition, the trial court appointed the Administrator General to administer the deceased's estate in lieu of the Appellant. That decision prompted the Appellant to lodge an appeal to the District Court of Kinondoni. His appeal was dismissed for want of merit. Still aggrieved, the Appellant appealed before this Court with five grounds which may be crystallised as hereunder;

- 1. That, the District Court erred in law by confirming the appointing of the Administrator General who is not among the persons capable to be appointed as administrators according to the Fifth Schedule to the Magistrates' Courts Act [Cap. 11 R. E. 2002].*
- 2. That, District Court erred in law and facts by failing to observe that failure to file the inventory is not among the grounds for revocation of letters of administration listed under paragraph 2 (a) of the Fifth Schedule to the Magistrates Courts Act [Cap. 11 R. E. 2002].*
- 3. That, the District Court erred in law and facts by failing to observe that, Appellant has sufficiently explained the reason for failure to file the inventory within time.*
- 4. That, District Courts erred in law and fact by failing to hold that the trial court has failed to address issues between the parties so as to reach to a just and fair decision.*
- 5. That, having ruled that ground three succeeds, the District Court erred in law and fact by dismissing the entire appeal.*

When the appeal was called for hearing, the Appellant had the services of Mr. Kennedy Sangawe, learned Advocate whilst, the Respondent was represented by Ms. Maria Mushi, learned Advocate. By consent, the appeal was argued by way of written submissions.

Starting with the first ground, Mr. Sangawe submitted that, the Primary Court has jurisdiction to appoint and revoke an administrator pursuant to paragraph 2 of the Fifth Schedule to the Magistrates Courts Act [Cap. 11 R.E. 2019] ("the Fifth Schedule") where the applicable law is Islamic or Customary law, but such jurisdiction does not extend to appointment of the Administrator General upon revocation of the current administrator. By appointing the Administrator General, the trial court had assumed jurisdiction which it did not have. He cited the case of **Fanuel Mantiri Ng'unda v. Herman Mantiri Ng'unda and Two Others** [1995] TLR 155 to support his point. He added that, the Administrator General (Powers and Functions) Act [Cap 27 R.E. 2002] provides for the appointment of Administration General in probate matters but, it does not address matters which are before the Primary Court. Concerning the second ground, he submitted that, paragraph 2 (a) of the Fifth Schedule provides for the grounds of revocation and failure to file inventory is not among those grounds. Thus, it was wrong for the District Court to use such ground in revoking the Appellant as administrator of the deceased's estate.

In respect of the third ground, he submitted that, the Appellant had filed the inventory within time, that is why the Respondent was able to raise

her objection against the appointment of the administrator and unfair distribution. To expound his point, he argued that, the Appellant submitted the inventory on 31st December, 2018 and it was on the same day when the trial court entertained the objection on the ground of unfair distribution. He added that, the Appellant sufficiently explained that, he did the distribution soon after consulting with the BAKWATA.

On the fourth ground, he argued that, the District Court failed to observe that, the trial court did not address the issues between the parties and hence, it reached into unfair decision. Concluding with the fifth ground, he submitted that, it was an error for the District Court to dismiss the appeal in its entirety while one among the grounds succeeded. In that regard, he prayed for the appeal to be allowed by quashing the decision of the trial court on revocation of the Appellant.

In reply, Ms. Mushi was of the view that, the Primary court has jurisdiction to appoint the Administrator General because section 2 of the Administrator General (Powers and Functions) Act defines "court" to mean High Court and subordinate courts which includes the Primary Court. Also, paragraph 2 of the Fifth Schedule empowers the Primary Court to appoint an impartial person and according to her, the Administrator General is an

impartial person. She added that, the cited case of **Fanuel Mantiri Ng'unda v. Herman Mantiri Ng'unda and Two Others** is misplaced as the Primary Court has jurisdiction over matters concerning administration of the estate as provided under section 15 (1) of the Magistrates Courts Act [Cap. 11 R. E. 2002] ("the MCA") and this was emphasised in the case of **Ibrahim Kusaga v. Emmanuel Mweta** [1986] TLR 26. In respect of the second ground, it was submitted that, section 107 of the Probate and Administration of Estate Act [Cap. 352 R. E. 2002] ("the Probate Act") requires the administrator or executor to file an inventory before the court within six months from the date of grant of letters of administration. Failure to file the same, may lead to revocation as provided under section 49 of the Probate Act and rule 29 (1) of the Probate Rules. To support her view, she cited the case of **Joseph Mniko and Others**, Probate and Administration Cause No. 48 of 1996 HC (unreported). She further stated that, in the matter at hand, the revocation was proper because no inventory was filed within six months, which contravenes section 107 of the Probate Act.

On the third ground, she submitted that, the argument by the Appellant that he failed to file the inventory because he had to consult with the BAKWATA does not hold water because, rule 10 of the Primary Courts

(Administration of Estates) Rules, GN No. 49 of 1971 and paragraph 11 of the Fifth Schedule requires the administrator to divide the deceased assets within four months from his appointment. In that regard, such consultation by the Appellant with BAKWATA ought to be conducted within such period.

As for the fourth ground, she submitted that, the ground is devoid of merit because the Appellant failed to clarify on the purported issues which were not addressed and determined by the trial court and District Court. On the fifth ground, she submitted that, ground three of the appeal before the District Court was not the determinant ground of the entire appeal. Hence, the District Court did not err by dismissing the entire appeal irrespective such ground being merited. Therefore, she prayed for the appeal to be dismissed.

In his rejoinder, apart from reiterating his submission in chief, Mr. Sangawe submitted that, the Administrator General is only appointed under the Administrator General (Powers and Functions) Act, thus, any appointment by another law is inappropriate and legally unacceptable. Also, in the trial court's record, there were no reasons recorded in the proceedings for such appointment as required under section 5 of the Administrator General (Powers and Functions) Act. He further submitted that, the issues of misuse of the deceased properties and unfair distribution are the ones

which were not addressed by the trial court. Therefore, he reiterated his prayer in his chief submission.

Having considered the rival submissions by the counsel for both sides and the petition of appeal in the light of evidence on record, the issues for determination are; **one**, *whether revocation of the Appellant's appointment was proper* and **two**, *whether the Primary Court is empowered to appoint the Administrator General.*

It is common knowledge that the Primary Court has been conferred with jurisdiction to entertain administration cases where the law applicable is customary law or Islamic law as provided under Paragraph 1 (1) of the Fifth Schedule. Likewise, it has power to appoint one or more persons interested in the estate of the deceased, an officer of the court or some reputable and impartial person to be administrator of the estate of the deceased pursuant to Paragraph 2 (a) and (b) of the Fifth Schedule. Equally, just like the power to appoint, pursuant to paragraph 2 (c) of the Fifth Schedule, it has the powers to revoke any appointment of the administrator for good and sufficient cause. However, according to rule 9 (1) of the Primary Courts (Administration of Estates) Rules such revocation can be made on the ground that, the administrator has been acting in contravention of the terms

of the grant or wilfully or negligently against the interests of creditors or beneficiaries of the estate.

In the matter at hand, it was the contention of the counsel for the Appellant that, failure to file an inventory is not among the grounds for revocation. It is the requirement under rule 10 (1) of the Primary Courts (Administration of Estates) Rules for the administrator to submit to the court the inventory (Form No. V) stating all assets and liabilities of the deceased person's estate. Thus, if the administrator fails to submit the inventory as per requirement of the law, his appointment can be revoked under rule 9 (1) (e) of the Primary Courts (Administration of Estates) Rules. Reverting to the record of the trial court, on 20th March, 2019, after being granted of administration, the Appellant was ordered to submit Form No. V before the trial court on 23rd April, 2019. It is also on record that, on 23rd April, 2019, the Appellant informed the trial court that, he has returned Form No. V. The record shows that, the Appellant signed below such information. Thereafter, the trial court adjourned the matter until 23rd August, 2019 for closing of the matter. In addition, the trial court ordered that, the Appellant be given various documents to be submitted to NMB bank, UMOJA bank and the JWTZ. In the trial record, there is Form No. V submitted by the Appellant

and witnessed by the trial Magistrate. This in itself proves that, the Appellant had complied with the law and the order of the court by submitting the inventory. Therefore, although failure to file inventory is among the grounds for revocation of administrator, but it was wrong for the District Court to conclude that there was no inventory on the record that was filed by the Appellant. Thus, the second ground lacks merit.

However, the trial court, revoked the appointment of the Appellant on the ground of unfair distribution of the deceased assets. This reason was upheld by the District Court. It is obvious from the record that, the distribution was made by the BAKWATA and not the Appellant as required by law. The Appellant admitted so when he was questioned by the trial court. Although he is not restricted to consult religious authority, but by letting the distribution to be made by the BAKWATA rather than himself, is a clear indication that he has failed to fulfil his duties as administrator of the estate of the deceased. Therefore, I find no reason to fault with the decision of the District Court which found that the reasons for revocation by the trial court were valid. Thus, it is my finding that, revocation of the Appellant's appointment was proper. Hence, the first issue is answered positively.

Returning to the second issue, as stated herein above, the Primary Court has powers to appoint one or more persons interested in the estate of the deceased, an officer of the court or some reputable and impartial person to be administrator of the estate of the deceased pursuant to Paragraph 2 (a) and (b) of the Fifth Schedule. However, the Administrator General is not among the persons who are mentioned under paragraphs (a) and (b) of the Fifth Schedule to be appointed as administrator. It can be recalled that, the appointment of the Administrator General by the court is made under the proviso to section 5 (1) of the Administrator General (Powers and Functions) Act. Nevertheless, according to paragraph 1 (2) (a) of the Fifth Schedule, the jurisdiction of the Primary Court over administration of deceased estate is ousted when it comes to the application of the Administrator General (Powers and Functions) Act. Besides, if it was intended for him to be appointed by the Primary Court, it could have been expressly stated so under paragraph 2 (a) and (b) of the Fifth Schedule. In the considered view of this Court, the appointment of the Administrator General is not proper, as according to paragraph 2 (a) and (b) of the Fifth Schedule, he is not among the persons who can be appointed by the Primary Court as administrator of deceased estate. So long as it revoked the Appellant, the trial court should have appointed persons who are mentioned under paragraph 2 (a) and (b)

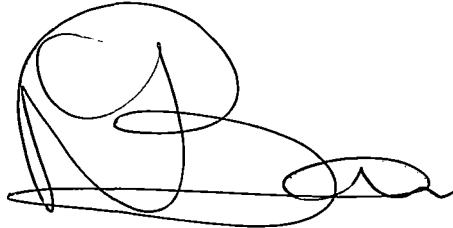
of the Fifth Schedule and not otherwise. Thus, in the circumstances of this case where there is conflicting interest between the Appellant and the Respondent, an officer of the court or reputable impartial person, can serve the purpose other than heir or beneficiary. Thus, the first ground has merit because the second issue is negatively answered.

The third, fourth and fifth grounds need not detain this Court. As for the third ground, since the inventory was timely filed, the ground becomes meaningless. Concerning the fourth ground, although the issue of unfair distribution was prematurely raised because Form VI had not been formally filed, but the trial court extensively addressed the same. Thus, the fourth ground has no merit. In respect of the last ground, I agree with the counsel for the Respondent that, the contended ground was not the pillar of the appeal which regardless being merited, could have reversed the outcome of the entire appeal.

That being said, the appeal is partly allowed. The order of appointment of the Administrator General is hereby set aside. I direct the Kawe Primary Court (the trial court) to appoint a reputable and impartial person pursuant to paragraph 2 (b) of the Fifth Schedule to the Magistrates Courts Act [Cap. 11 R. E. 2019] to be the administrator of the estate of the late Hassan

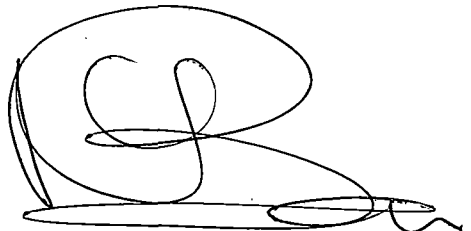
Hanzuruni Farahani in lieu of the Appellant. Owing to the nature of the matter, I make no orders as to costs.

It is so ordered.

A handwritten signature in black ink, consisting of a large, stylized 'B' followed by a horizontal line and a small flourish.

I. K. BANZI
JUDGE
20/07/2021

Delivered by the Deputy Registrar this 20th July, 2021 in the presence of Mr. Kennedy Sangawe, learned Advocate for the Appellant and Ms. Maria Mushi, learned Advocate for the Respondent.

A handwritten signature in black ink, consisting of a large, stylized 'B' followed by a horizontal line and a small flourish.

I. K. BANZI
JUDGE
20/07/2021